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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-413

PHELPS DODGE REFINING CORPORATION,
Petitioner,

versus

ISABEL ROBLEDO, CARLOS ROBLEDO, JR., MARY LOU ROBLEDO, also known as MARY LOU TORRES, SAMUEL ROBLEDO and YOLANDA ROBLEDO,
Respondents.

PETITION FOR WRIT OF CERTIORARI OF PHELPS DODGE REFINING CORPORATION

William J. Mounce,
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Phelps Dodge Refining
Corporation

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

No.

PHELPS DODGE REFINING CORPORATION,
Petitioner,

versus

ISABEL ROBLEDO, ET AL,
Respondents.

PETITION FOR CERTIORARI

TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES, OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, PHELPS DODGE REFINING CORPORATION, respectfully petitions said Honorable Court for a writ of certiorari, to review a judgment rendered against Petitioner by the United States Court of Appeals for the Fifth Circuit, and in support of such Petition respectfully shows Your Honors as follows:

OPINIONS DELIVERED IN THE COURTS BELOW

No opinion has been published. The United States District Court for the Western District of Texas, El Paso Division, filed its "Memorandum Opinion", a

copy whereof is hereto appended; but the United States Court of Appeals for the Fifth Circuit affirmed *per curiam* the judgment of the said District Court, without writing any formal opinion or allowing any oral argument.

JURISDICTIONAL STATEMENT

The judgment sought to be reviewed was dated and entered by said Court of Appeals on May 27, 1971, and affirmed the judgment of said District Court which was dated and entered on November 23, 1970. Said Court of Appeals, by its *per curiam* order dated and entered on July 1, 1971, denied Petition For Rehearing And Petition For Rehearing En Banc. The statutory provision believed to confer jurisdiction on this Court to review the judgment below by writ of certiorari is Title 28, United States Code, Section 1254(1); 28 U.S.C.A. 1254(1); June 25, 1948, c. 646, 62 Stat. 928.

QUESTION PRESENTED FOR REVIEW

Where Texas law required proof of *gross* negligence (and not mere ordinary negligence) to recover *exemplary* damages for wrongful death, and by Texas legal standards no gross negligence was proved, did said Court of Appeals err in summarily affirming the judgment of the District Court in a diversity of citizenship suit, whereby Respondents were awarded *exemplary* damages against Petitioner, as a result of the refusal by both such courts to apply Texas law?

REASONS FOR ALLOWANCE OF THE WRIT

The substantive law of the State of Texas was not applied, but ought to have been applied in this diversity of citizenship case, because citizens of States other than Texas should be afforded the same protection from unjust claims as Texas citizens enjoy. Had this suit been tried in a Texas State court, Respondents could not possibly have recovered *exemplary* damages, because, at most, only *ordinary* negligence, and not gross negligence was proved, as hereinafter demonstrated. This case presents not merely an isolated, non-recurring erroneous judgment; it strikes a blow at every employer in Texas who, by the happenstance of diversity of citizenship, may have the misfortune of being compelled to litigate and to be unjustly mulcted for exemplary damages in a Federal District Court, despite his non-liability under Texas law. The Supreme Court should exercise its power of supervision to halt the continuous erosion of the doctrine of *Erie v. Tompkins* occurring in the Fifth Circuit during the last few years; surely, such erosion is a matter of sufficient importance to be worthy of Your Honors time and attention.

In fine, said Court of Appeals, by its affirmance of the District Court's judgment, has in effect decided an important State question in a way in conflict with applicable Texas law, and thereby has sanctioned the District Court in so far departing from the usual and accepted course of judicial proceedings, as to call for the Supreme Court's power of supervision.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional and statutory provisions are involved:

Article 16, Section 26, of the Texas Constitution; Vol. 3, page 228, Vernon's Annotated Constitution of the State of Texas, providing as follows:

> "Sec. 26. Every person, corporation, or company, that may commit a homicide, through wilful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, heirs of his or her body, or such of them as there may be, without regard to any criminal proceeding that may or may not be had in relation to the homicide."

Article 4673, Revised Civil Statutes of Texas; Vol. 13A, page 229, Vernon's Annotated Revised Civil Statutes of Texas, as follows:

> "When the death is caused by the wilful act or omission, or gross negligence of the defendant, exemplary as well as actual damages may be recovered."

The first sentence of Article 8306, Section 3, Revised Civil Statutes of Texas; Vol. 22, page 11, Vernon's Annotated Revised Civil Statutes of Texas, as follows:

"Sec. 3. The employees of a subscriber and the parents of minor employees shall have no right of action against their employer or against any agent, servant or employee of said employer for damages for personal injuries, and the representatives and beneficiaries of deceased employees shall have no right of action against such subscribing employer or his agent, servant or employee for damages for injuries resulting in death, but such employees and their representatives and beneficiaries shall look for compensation solely to the association, as the same is hereinafter provided for."

The first sentence of Article 8306, Section 5, Revised Civil Statutes of Texas; Vol. 22, page 14, Vernon's Annotated Revised Civil Statutes of Texas, as follows:

"Sec. 5. Nothing in this law shall be taken or held to prohibit the recovery of exemplary damages by the surviving husband, wife, heirs of his or her body, or such of them as there may be of any deceased employe whose death is occasioned by homicide from the wilful act or omission or gross negligence of any person, firm or corporation from the employer of such employe at the time of the injury causing the death of the latter."

STATEMENT OF THE CASE

Isabel Robledo, widow of Carlos Robledo, Sr., deceased, and four of his children, namely, Carlos Robledo, Jr., Mary Lou Robledo (Torres), Samuel Robledo and Yolanda Robledo, comprising the five Respondents herein, sued Petitioner in the United States District Court for the Western District of Texas, for exemplary damages only, after being paid their workmen's compensation benefits, for the death of said Carlos Robledo, Sr., who sustained fatal burns after falling in Petitioner's shut down copper furnace. Each of Respondents was a citizen of Texas, and each of them sued for an amount, exclusive of interest and costs, far in excess of $10,000; Petitioner was a corporation organized under the laws of the State of New York, and had its principal place of business in a State other than Texas; thus said Federal District Court had jurisdiction based on diversity of citizenship under Title 28, U.S.C., Sec. 1332(a)(1) and (c); 28 U.S.C.A. 1332(a)(1) and (c). Such District Court rendered judgment for Respondents against Petitioner, as exemplary damages for alleged gross negligence in the aggregate sum of $40,000. On Petitioner's appeal, a three judge panel of the United States Court of Appeals for the Fifth Circuit put the case on the summary calendar, and by a *per curiam* judgment, and without allowing oral argument, affirmed the District Court's judgment, and thereafter denied petition for rehearing and for rehearing *en banc*.

Respondents claimed that the death of their husband and father was caused by gross negligence of Peti-

tioner, and that they were thus entitled to recover exemplary damages. Under Texas law, the Workmen's Compensation Act supersedes the common law as to injuries and death caused by ordinary negligence, Art. 8306, Sec. 3, R.C.S. of Texas, but as seen from the Constitutional and statutory provisions stated above, Art. 16, Sec. 26, Tex. Constitution, Art. 4673, R.C.S. of Tex., and Art. 8306, Sec. 5, R.C.S. of Tex., additional recovery may be allowed where death is caused by an employer's gross negligence. Thus, the issue in the District Court was whether Petitioner was "guilty" of gross negligence, since ordinary negligence would come within the Workmen's Compensation Act.

Summarized, the evidence showed that Robledo fell into the hot part of the furnace along with the steel platform on which he was working, when all four of the cables holding it suddenly broke; the steel platform was constructed to replace a wooden one, since it was to be used inside a copper furnace after being shut down but prior to complete cooling; such substitution of platforms was done to avoid any danger to employees from retained heat in the bottom of the furnace; the steel platform and its supporting cables had been tested and inspected by fellow employees and found all right, and had been used safely the day of the accident by other workers prior to its collapse; safety meetings attended by Robledo and other employees of Petitioner were held daily, including the morning of the incident but prior thereto; on the preceding day a report that the cables in question were rusty had been checked by two other employees, and the reported discoloration on the cables was determin-

ed to be tarnish or a manufacturer's coating rather than rust or other defect; the work contemplated from the platform by Robledo was replacement of worn bricks in the upper part of the furnace; Robledo was a bricklayer during his more than 18 years of employment by Petitioner, and had often replaced such bricks while on the former wooden platform; a fellow employee, Alfonso Ingo, was on the platform with the decedent for some five minutes without incident; they left to get some materials and then got back on the platform, shortly after which it fell with them, but Ingo was not severely injured; Ingo testified that he considered the job safe. There was no competent evidence to show why all four of the cables broke at the same time, or how or why one of the cables broke in two separate places about 18 inches apart. There was utterly no evidence of any wilfulness.

At the close of Respondent's case, Petitioner moved for an instructed verdict; later, at the close of all the evidence, Petitioner again moved for an instructed verdict; and after the verdict of the jury in favor of Respondents, Petitioner moved for judgment notwithstanding the verdict. All of these motions were denied by the District Court. The jury returned a verdict whereby each of the Respondents was awarded exemplary damages against the Petitioner for gross negligence, and based upon such verdict, but with some reduction for three of the said children's respective awards, the District Court rendered judgment against Petitioner in the aggregate sum of $40,000.00.

At every opportunity under the Federal Rules of Civil Procedure, Petitioner moved for an instructed verdict and for judgment, because, the District Court having acquired jurisdiction by virtue of diversity of citizenship, the clearly defined law of Texas should be applied, which, under the facts of the case as presented by Respondents, would have entitled them to recover nothing by way of punitive damages. The refusal of the District Court to so apply the clearly delineated standards of Texas law, as pronounced by the Texas Supreme Court, as well as by its other appellate courts, was the basis upon which Petitioner's appeal was perfected to the Court of Appeals for the Fifth Circuit. Said Court of Appeals, by affirming *per curiam,* compounded the error of refusing to apply the Texas law in a diversity of citizenship case.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF WRIT

The Trial Court, in granting Judgment for Respondents, and the Court of Appeals in affirming that Judgment, violated the principles established by this Honorable Court in *Erie R. Co. v. Tompkins,* 58 S. Ct. 817, 304 U.S. 64, 82 L. Ed. 1188 (1938); *Guaranty Trust Co. of New York v. York,* 65 S. Ct. 1464, 326 U.S. 99, 89 L. Ed. 2079, 169 ALR 1231 (1945); and *Bernhardt v. Polygraphic Co. of America,* 76 S. Ct. 273, 350 U.S. 198, 100 L. Ed. 199 (1956). Respondents' suit was brought under a Texas statute, Art. 8306, Sec. 5, Revised Civil Statutes of Texas, and under Art. 16, Sec. 26, of the Texas Constitution, which permit a surviving spouse and children

to recover exemplary damages when the deceased's death is caused by a wilful act or omission or gross negligence. In 1888 the Texas Supreme Court, in *Missouri Pacific Ry. Co. v. Shuford,* 72 Tex. 165, 10 S.W. 408, defined the term "gross negligence" to mean "that entire want of care which would raise the belief that the act or omission complained of was the result of conscious indifference ..." Later, the Texas Supreme Court, in *Bennett v. Howard,* 141 Tex. 101, 170 S.W. 2d 709 (1943), not only approved such definition but declared that any other definition was overruled. The appellate courts of Texas have stressed the word "conscious", and have emphasized the word "entire" in applying such definition; such courts have also repeatedly stated that *mere* indifference is not enough to constitute gross negligence, that there must be *conscious* indifference to the right or welfare of persons affected thereby. *Sheffield Division, Armco Steel Corp. v. Jones,* 376 S.W. 2d 825 (Tex. S. Ct. 1964); *Abercrombie v. Scott,* 267 S.W. 2d 206 (Tex. Civ. App. 1954), writ refused, no reversible error.

Thus, the clear Texas law applicable to the case before the Trial Court was that the Respondents could not recover exemplary damages against Petitioner, even if the death of Carlos Robledo, Sr. was due to ordinary negligence, or if there was *any* evidence that the Petitioner exercised *any* degree of care; i.e., gross negligence is completely negated if there is some evidence of any care. Some of the additional decisions wherein the above principles and definitions are discussed and applied are *Texas Pacific Coal and Oil Co. v. Robertson,* 79 S.W. 2d 830 (Tex. S. Ct. 1939); and

Loyd Electric Co. v. DeHoyos, 409 S. W. 2d 893 (Tex. Civ. App. 1966), writ of error ref'd outright without qualification.

The U. S. Court of Appeals for the Fifth Circuit has heretofore uniformly followed said principles and applied said definition: *McAlester v. Sinclair Refining Co.,* 146 F. 2d 36 (5th Cir. 1944); *Helms v. Universal Atlas Cement Co.,* 202 F. 2d 421 (5th Cir. 1953); and *Wooley v. S. W. Portland Cement Co.,* 272 F. 2d 906 (5th Cir. 1959). The evidence in the Trial Court demonstrated that there was no question but that the Respondent had exercised some degree of care for the safety, working conditions and equipment used by the decedent. There was not one word, not one word, of evidence before the Trial Court which would support the finding that the Petitioner had a conscious indifference for the right or welfare of the decedent, or that the actions or omissions of the Petitioner were wilful or amounted to an entire want of care.

It is held in Texas that the intention or mental attitude of the defendant is an important factor in determining the question of gross negligence, and that such mental attitude must show a *conscious* indifference to consequences, and border on a quasi-criminal act or malfeasance, or as otherwise stated, the plaintiff must prove, not merely that the defendant could or should have foreseen and prevented the accident, but that the defendant acted wilfully, intentionally, or with a degree of negligence approximating a *fixed purpose* to bring about the injury; *Southern Cotton Press & Manufacturing Co. v. Bradley,* 52 Tex. 587 (1880); *Ben-*

nett v. Howard, supra.; *Sheffield Division, Armco Steel Corp. v. Jones,* supra. When tested by these criteria, Respondents failed to prove any gross negligence on Petitioner's part. There is not a scintilla of evidence to show that Petitioner or its employees knew of any defect in the cables, or that it acted wilfully, maliciously or wantonly in having the brick work done before the residual copper in the furnace had completely cooled. Neither Ingo nor Robledo, nor anyone else thought that the job entailed an unreasonably hazardous condition, because, as Ingo said, he and Robledo would not have gone on the platform, had it appeared unsafe to do so.

The importance, therefore, of reversing the judgment of the Court of Appeals and the Trial Court, under the evidence as presented, is critical in reaffirming this Court's prior decisions in *Erie R. Co. v. Tompkins,* supra.; *Guaranty Trust Co. of New York v. York,* supra.; and *Bernhardt v. Polygraphic Co. of America,* supra. This importance is emphasized by the proposition that, in diversity cases, the Federal Courts must insure that equal treatment is afforded to the litigants in applying state law, and that an undue advantage is not available to a plaintiff in a death case against his decedent's employer.

The error of the Trial Court is hidden in the subtleties of it allowing the Respondents to present their case, remain silent while the jury returns a verdict that is not sustainable in a Texas court, and then resolving to accept that verdict and enter judgment, with the statement in the unpublished memorandum opinion

of, "It is very doubtful in the mind of the Court that the facts have established gross negligence; however, the Court is reluctant to set aside a jury verdict and has concluded that the burden of appeal should be placed on the Defendant in this case."

If the judgment of the Trial Court is allowed to stand, then the principles of *Tompkins, York* and *Polygraphic Co. of America* become a vapor, condensing only when the trial judge feels so inclined. The effect of the totality of the evidence became a question of law, upon which the Trial Court was requested at every stage to rule in light of the Texas decisions, and its refusal to grant the relief, clearly required, is the basis upon which this Petition is made.

Petitioner confesses that its burden in asking this Honorable Court to review the evidence, set aside the jury verdict and render judgment for Petitioner is a weighty one, but the type of decision rendered by the Trial Court and summarily affirmed *per curiam* by the Fifth Circuit, is the very type which will encourage, by reward, wholesale forum shopping in virtually every death case against non-Texans arising in connection with the Workmen's Compensation Act. According to the records of the Texas Industrial Accident Board, there were 717 fatal accidents covered by Workmen's Compensation and considered by said Board during the period of September 1, 1968 to August 31, 1969, and that number increased to 769 during the period of September 1, 1969, to August 31, 1970. Thus, the question here presented for review is highly important to every

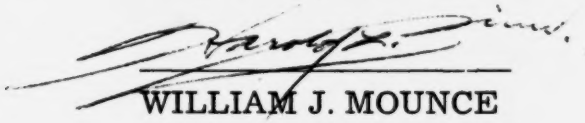
employer in Texas who is not a citizen of that State, and should merit the attention of this Honorable Court.

CONCLUSION AND SIGNATURES

All parties required by the Rules of the Supreme Court of the United States to be served have been duly served with this Petition, as shown by Certificate of Service endorsed hereon.

WHEREFORE, Petitioner Phelps Dodge Refining Corporation prays that the Honorable Supreme Court of the United States grant this Petition for a writ of certiorari, in order to review and correct said judgment of the United States Court of Appeals for the Fifth Circuit, and to reverse same, as well as the underlying District Court judgment which was erroneously affirmed.

Respectfully submitted,



WILLIAM J. MOUNCE
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and
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Attorneys for Petitioner
Phelps Dodge Refining
Corporation

Post Office Address of said attorneys:
P. O. Drawer 1977, El Paso, Texas 79950

CERTIFICATE OF SERVICE

The undersigned attorney of record for Petitioner Phelps Dodge Refining Corporation, hereby certifies as follows:

(a) that I am a member of the bar of the United States Supreme Court, and that I have duly served all parties required by the Rules of said Court to be served with the foregoing Petition For Writ of Certiorari, as hereinafter shown;

(b) that the names and post office addresses of each attorney of record for each adverse party separately represented are as follows:

Mr. Richard T. Marshall, P.O. Box 888, El Paso, Texas 79945, attorney for Respondent Isabel Robledo;

Mr. John C. Steinberger, 310 American Bank of Commerce Building, El Paso, Texas 79901, attorney for Respondents Carlos Robledo, Jr., Samuel Robledo and Yolanda Robledo; and

Mr. Sam J. Dwyer, Bassett Tower, El Paso, Texas 79901, attorney for Respondent Mary Lou Robledo (Torres);

(c) that on this day I served three printed copies of the foregoing Petition For Writ of Certiorari on each of said attorneys for said Respondents, by depositing same in the United States post office in El

Paso, Texas, with first class postage prepaid, properly addressed to each of said attorneys for Respondents at his said respective post office address.

EXECUTED this 20th day of September, 1971.

Attorney for Petitioner Phelps Dodge Refining Corporation

A. Copy of Unpublished Per Curiam Opinion of Court of Appeals

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1103
Summary Calendar*

ISABEL ROBLEDO, a widow,
Plaintiff-Appellee,
versus

PHELPS DODGE REFINING CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

---

(May 27, 1971)

Before GEWIN, GOLDBERG and DYER,
Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir. See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

[1]See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

B. Copy of Unpublished Memorandum Opinion of U. S. District Court.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

ISABEL ROBLEDO, a widow,

versus

PHELPS DODGE REFINING CORPORATION,
A New York Corporation.

EP-70-CA-82

MEMORANDUM OPINION

Filed: Nov. 23, 1970

The Court has considered the record in this case and the Motions of the attorneys, together with the briefs filed herein.

It is very doubtful in the mind of the Court that the facts have established gross negligence; however the Court is reluctant to set aside a jury verdict and has concluded that the burden of appeal should be placed on the Defendant in this case.

This case presents questions of whether or not the Defendant violated its non-delegable duty to furnish deceased ROBLEDO a safe place to work safe, suitable

appliances and instrumentalities for the work at hand. (See Motion Salt Co. vs. Wells, 70 SW2d. 409), and the further question of whether these violations which the jury found occurred were such as to constitute gross negligence. The evidence supports the finding that the deceased was not responsible for the equipment and instrumentalities used and not familiar with the defects alleged by Plaintiff to exist in the procedure involved in the work being performed. Evidence also supports the conclusions of the Plaintiff that the cable used was rusty, that a prior policy of using new cable in this dangerous work was disregarded; that the cable used had not been cared for or tested prior to its use in a hazardous undertaking and that adequate provision was not made for retrieving employees engaged in the hazardous work undertaken in the event of equipment failure and that protective clothing was not furnished for the hazardous work and there was a change of policy in permitting the furnace to continue in operation while work was being done above the furnace.

Each of these acts support a finding of negligence on the part of the Defendant, but there remains the question of whether these acts collectively or any one of them alone presents a case of gross negligence. While the question is not free from doubt the Court has determined that these acts of negligence established by the evidence relate to the question of furnishing a safe place to work and the question of furnishing safe, suitable appliances and instrumentalities for the work at hand and that collectively the jury could find a case of gross negligence.

The Court has concluded as a matter of law that the smallest amount of exemplary damages found by the jury for the children would apply to all of the children since there is no basis for a different award between the children so far as exemplary damages are concerned.

The Court has also concluded that those children who had no actual damages can not recover any exemplary damages and has entered its Judgment accordingly.

(Signed) ERNEST GUINN
UNITED STATES
DISTRICT JUDGE

C. Copy of Judgment of U.S. Court of Appeals For Fifth Circuit.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1970

No. 71-1103
Summary Calendar

D. C. Docket No. EP 69-CA-82

ISABEL ROBLEDO, a widow,
Plaintiff-Appellee,
versus

PHELPS DODGE REFINING CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

---

Before GEWIN, GOLDBERG and DYER,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court

for the Western District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

May 27, 1971

Issued As Mandate:

D. Copy of Order by U.S. Court of Appeals Denying Rehearing and Rehearing En Banc

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1103

ISABEL ROBLEDO, a widow,
Plaintiff-Appellee,

versus

PHELPS DODGE REFINING CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

---

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion May 27, 1971, 5 Cir., 1971, ____ F.2d ____).

(July 1, 1971)

Before GEWIN, GOLDBERG and DYER,
Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regu-

lar active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

E. Copy of Judgment of U.S. District Court

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

ISABEL ROBLEDO, a widow,
vs.
PHELPS DODGE REFINING CORPORATION,
a New York Corporation.

EP-69-CA-82

Filed: Nov. 23, 1970

Came on to be heard the above cause on May 4, 1970, and both parties announced ready for trial, the jury was empanelled and the evidence received, and after argument of counsel and the charge of the Court, the jury retired to consider its verdict and on May 5, 1970, did enter the following verdict:

"We, the Jury, find for the Plaintiffs and assess their damages as follows:

	Actual Damages	*Exemplary Damages*
Isabel Robledo, Widow,	$ 129,600	$ 20,000
Carmen Robledo Alba	$	$ 5,000
Carlos Robledo, Jr.	$ 4,200	$ 25,000
Carolina Robledo	$ -0-	$ 5,000
Delia Robledo Ortiz	$ -0-	$ 5,000
Mary Lou Robledo also known as Mary Lou Torres	$ 3,000	$ 20,000
Samuel Robledo	$ 2,400	$ 25,000
Yolanda Robledo	$ 1,200	$ 5,000

5 May 1970
Date

/s/ Bruce A. Bryant
Foreman

Prior to the submission to the jury, Motions for Instructed Verdict were made upon the conclusion of Plaintiffs' case and upon the conclusion of the trial, and the Court overruled same.

After receipt of the Verdict Plaintiff filed Motion for Judgment and Defendant filed Motion for Judgment Notwithstanding the verdict and the Court permitted the attorneys to file briefs in support of their motions and having examined the record and the briefs and heard argument of counsel, the Court is of the opinion that Judgment should be entered on the Verdict as follows:

It is therefore ORDERED, ADJUDGED AND DECREED that the Plaintiff ISABEL ROBLEDO do have and recover of the Defendant PHELPS DODGE RE-

FINING CORPORATION, a New York Corporation, the sum of TWENTY THOUSAND ($20,000) DOLLARS; that the Plaintiffs CARLOS ROBLEDO, JR., MARY LOU ROBLEDO, also known as MARY LOU TORRES, SAMUEL ROBLEDO and YOLANDA ROBLEDO shall each recover from the Defendant the sum of FIVE THOUSAND ($5,000.00) DOLLARS, and that Plaintiffs CARMEN ROBLEDO ALBA, CAROLINA ROBLEDO and DELIA ROBLEDO ORTIZ shall each take nothing.

ENTERED THIS 23rd. day of November, 1970.

(Signed) ERNEST GUINN
UNITED STATES DISTRICT
JUDGE

Supreme Court, U.S.
FILED
OCT 16 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-413

PHELPS DODGE REFINING CORPORATION,

Petitioner,

vs.

ISABEL ROBLEDO, CARLOS ROBLEDO, JR., MARY LOU ROBLEDO, also known as MARY LOU TORRES, SAMUEL ROBLEDO and YOLANDA ROBLEDO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

1971

No. 71-413

PHELPS DODGE REFINING CORPORATION,

Petitioner,

vs.

ISABEL ROBLEDO, CARLOS ROBLEDO, JR., MARY LOU ROBLEDO, also known as MARY LOU TORRES, SAMUEL ROBLEDO and YOLANDA ROBLEDO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents, ISABEL ROBLEDO, CARLOS ROBLEDO, JR., MARY LOU ROBLEDO, also known as MARY LOU TORRES, SAMUEL ROBLEDO and YOLANDA ROBLEDO, urge that writ of certiorari be denied herein.

OPINION BELOW

No opinion has been published. On May 27, 1971, the United States Court of Appeals, in No. 71-1103, Summary Calendar, affirmed, per curiam, the judgment

of the United States District Court for the Western District of Texas. Thereafter on July 1, 1971, the Fifth Circuit Court of Appeals denied, per curiam, Petitioner's Petition for Rehearing and Petition for Rehearing En Banc. Copies of the Judgment of the District Court and the ruling of the Court of Appeals are set out in the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

The jurisdictional requisites are stated in the petition.

QUESTIONS PRESENTED

In its action the Court of Appeals for the Fifth Circuit affirmed the District Court's interpretation of Texas law. The petition poses the following questions:

1. Whether gross negligence was proved by Texas legal standards.

2. Whether the judgment below is in violation of the principles established in *Erie R. Co. v. Tompkins*, 58 S.Ct.817, 304 U.S.64, 82 L.Ed.1188 (1938); *Guaranty Trust Co. of New York v. York*, 65 S.Ct.1464, 326 U.S.99, 89 L.Ed.2079, 169 ALR 1231 (1945); and *Bernhardt v. Polygraphic Co. of America*, 76 S.Ct.273, 350 U.S.198, 100 L.Ed.199 (1956).

STATEMENT

The statement in the petition is substantially correct, subject to the following additions and corrections:

1. The platform had never been used prior to the day of the accident by other workers. The accident occurred the first time it was used in the furnace.

2. The cables from which the supporting rig was made had been permitted to lie in an outdoor warehouse yard for many months or years without proper protection (R. 67, 84).

3. Petitioner did not know when and from what source it had purchased the cable (R. 66, 178).

4. Petitioner's assistant master mechanic, who inspected and approved the cables and the rig, was unfamiliar with standards for storage of cables as set out in standard cable manuals, although such manuals were available to him (R. 51, 92).

5. Said assistant master mechanic had no experience in rigging a platform such as the one which collapsed, prior to the time of the accident. (R. 87).

6. The Petitioner's plant safety officer was not consulted in regard to the construction of the platform or the rigging. (R. 87).

7. The decedent was killed following a fall into a new furnace while carrying out a new and untried procedure for which there were no standard working rules or amendments to the safety lectures (R. 163).

8. There was no rescue equipment or procedures, and there had never been any rescue drills in connection with the new furnace.

9. The type of cable used was a light ¼-inch marine tiller rope, which was not designed for the purpose used at the time (R. 86). In fact, one expert stated it was the worst possible wire rope Petitioner could have used. (R. 125).

10. Respondents' decedent was killed while suspended in a hot oven in a procedure which had never been attempted in any refinery, to the best of Petitioner's assistant master mechanic's knowledge(R. 99).

11. Neither said decedent nor his co-worker on the platform had ever worked in such a hot environment before, in a closed furnace. (R. 149, 165).

12. The winch supposed to raise the platform was inoperative at the time of the accident. (R. 154). In the absence of rescue equipment the two men in the furnace had to be pulled out manually by two fellow-employees, resulting in a delay which proved fatal to the decedent. (R. 153, 171).

13. The temperature in the oven was approximately 250 degrees Fahrenheit, according to the estimate of the only survivor who was in the oven at the time of the accident(R. 151).

14. The platform was not suspended properly and was inherently wobbly (R.113). It was wobbly as it was lowered into the furnace (R. 151).

15. The blowers designed to cool the furnace were not operating at the time of the accident(R. 155).

ARGUMENT

The Texas definition of gross negligence is not simple, but complex. Although, as Petitioner argues, it includes an entire want of care such as would raise the belief that the injury was the result of conscious indifference, the cases cited by Petitioner, as well as other decisions of the Supreme Court of Texas, have consistently applied this definition to acts of omission as well as to acts of commission. *Bowman v. Puckett*, 144 Tex. 125, 188 S.W.2d 571. Further, "every instance of gross negligence includes one of ordinary negligence." *Bonnell v. Seitt*, 314 S. W. 2d 520 (Tex. 1958).

The determination of gross negligence must be made by the jury, under Texas law, on the basis of the combination of circumstances present at the particular time and place. *Fancher v. Cadwell*, 314 S.W. 2d 820 (Tex. 1958); *Harbin v. Seale*, 454 S.W. 2d 271. (Tex. 1970).

Texas courts are enjoined by precedent from disturbing jury findings under the circumstances

in workmen's compensation cases, and as Petitioner agrees, this case arose under the Texas Workmen's Compensation Act. *Texas Employers Insurance Assn. v. Washington*, 437 S.W.2d 340 (Tex. Civ. App.), writ ref., n.r.e.; *Travelers Insurance Co. v. Wade*, 373 S.W.2d 881 (Tex.Civ.App.), writ ref., n.r.e. Further, the Act must be liberally construed in favor of the claimant. *Hargrove v. Trinity Universal Ins. Co.*, 256 S.W.2d 73 (Tex. 1953).

In its charge to the jury the District Court took pains to spell out the Texas definition of gross negligence, and, in effect, repeated this definition three times. (R. 209-210). The jury obviously found from a preponderance of the evidence that "in placing the men over a hot furnace, that is, one that was not cooled off completely, using this cable that had been out and exposed to the elements and not having any safety precautions if there should be a fall," under the Court's Texas definition of gross negligence, that there *was* gross negligence. Petitioner's quarrel is with the jury on the facts; and not with the Court on the law. The jury must determine credibility of the witnesses.

The facts speak for themselves. The co-worker, Alfonso Ingo, survived the fall. He was a slight, wiry man who was able to climb out of the furnace in a minute. He weighed 140 pounds. Respondents' decedent weighed 240 pounds. (R. 159). When the two rescuers were pulling him up, he couldn't hold on, and he fell down again into the furnace. (R. 153). Petitioner was guilty of a willful and conscious indifference to the safety of the decedent in its failure to provide any rescue methods or equipment while subjecting him to extreme hazard in working in a new procedure in a hot furnace. It wasn't the fall that killed him, it was being baked alive while waiting to be pulled out! Petitioner in its argument concentrates on measures taken to prevent collapse of the platform; and ignores the total lack of care, and the conscious indifference to the question of how to get trapped employees out of the furnace. The jury obviously considered the death

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of Respondents' decedent the proximate result of two acts by Petitioner; and under the charge and the Texas law they did not have to find both acts constituted gross negligence, merely one. Obviously the second act, the failure to consider rescue, was gross negligence. Respondents here argue that the first act, the failure to provide safe equipment and conditions to prevent the collapse of the rig, was also gross negligence, although, it is submitted, this proof was not necessary to support the jury verdict.

This failure of Petitioner and its counsel to properly evaluate the facts proven as showing two separate and distinct acts of omission by Petitioner may explain its misunderstanding of why the Circuit Court of Appeals affirmed the judgment of the District Court without argument and without written opinion. In this context, it is obvious that there was no valid appeal on the law in the courts below, and, to employ a noun coined by the editors of United States Law Week, there is no certworthiness in this case. 40 LW 1046

Nor is there an *Erie* violation here. Petitioner would have the Court view the Texas gross negligence definition as fixed and immutable, when in fact the Texas Supreme Court, in the spirit of Holmes, J. views experience as the life of the law, and in recent years is calling for a rule of reason in the determination of gross negligence. *Fancher v. Cadwell, supra; Harbin v. Seale, supra.* The *Erie* doctrine does not require the Federal Courts to worship the sterile doctrines and stale dogmas of ancient state law. *Erie* requires Federal Courts to apply state law, and to apply is to construe, to interpret. As *Fancher* and *Harbin* clearly demonstrate, the Texas law of gross negligence is alive and growing.

Petitioner complains that the question here is important because it sets precedent which will "encourage forum-shopping". Respondents are really somewhat disappointed because the decisions below were *not* published, and did *not* thus amount to much in the way of precedent. Respondents, having lost their husband and father, would like to feel

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that the action of the Courts below in applying and reaffirming the gross negligence law of Texas under the Texas Workmen's Compensation Act has had a salutary effect in encouraging a basic consideration for human safety in Texas industrial plants.

CONCLUSION

The Petition for Writ of Certiorari here is no more than a request that the Supreme Court review the weight of the evidence in a jury trial. There is neither an *Erie* question nor any other question here justifying certiorari.

WHEREFORE, Respondents pray that the Petition be denied.

Respectfully submitted,

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RICHARD T. MARSHALL

CERTIFICATE OF SERVICE

The undersigned attorney of record for Respondents hereby certifies as follows:

(a) That I am a member of the Bar of the United States Supreme Court, and that I have duly served all parties required by the Rules of said Court to be served with the foregoing Brief in Opposition to Petition for Writ of Certiorari.

(b) That the names and post office addresses of each attorney of record for the adverse party are as follows:

Mr. William J. Mounce

Mr. John A. Grambling

Mr. Harold L. Sims

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(c) That on this day I served three printed copies of the foregoing Brief in Opposition on each of said attorneys for said Petitioner, by depositing same in the United States Post Office in El Paso, Texas, with first class postage prepaid, properly prepaid, properly addressed to each said attorneys.

EXECUTED this 15th day of October, 1971.

RICHARD T. MARSHALL, Attorney
for Respondents.

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